Supreme Court, U.S.
FILED
MAR 6 - 2007
OFFICE OF THE CLERK

No. 06-863

In the Supreme Court of the United States

SHANE FAUSEY,

Petitioner,

v.

CHERYL HILLER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF FOR THE PETITIONER

MARK T. STANCIL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

HOWARD J. BASHMAN*
Law Offices of Howard J. Bashman
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Respondent's Attempts To Deny And Obscure The Deep And Widely Recognized Division Among The States Are Futile 3

A. The Pennsylvania Supreme Court And Other State High Courts Have Explicitly Recognized The Conflict And Two Recent Decisions Have Deepened It 3

B. Respondent Fails To Grasp The Important Qualitative Difference Between The "Harm" And "Best Interests" Standards 5

C. Respondent Does Not Dispute That States Have Adopted Divergent Standards On An Important Federal Constitutional Question 8

II. Providing States A Clear Legal Standard To Safeguard *Troxel*'s Fundamental Right Will Not "Constitutionalize" New Areas of Law Or "Enmesh" This Court In Case-By-Case Adjudication. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

Blixt v. *Blixt*, 774 N.E.2d 1052 (Mass. 2002) 3

Board of Trustees of Univ. of Ala. v. *Garrett*, 531 U.S. 356 (2001) 8

Hanson v. *Hanson*, 404 N.W.2d 460 (N.D. 1987) 7

Iadicicco ex rel. Watkins v. *Iadicicco*, 704 N.Y.S.2d 377 (App. Div. 2000) 7

In Interest of B.B., 559 So. 2d 1277 (Fla. Ct. App. 1990) 7

In re E.S. v. *P.D.*, 2007 WL 470389 (N.Y. 2007) 2, 4, 7

In re Marriage of Gebhardt, 783 P.2d 400 (Mont. 1989) 7

In re Marriage of Howard, 661 N.W.2d 183 (Iowa 2003) 3

In re Marriage of Knighton, 723 S.W.2d 274 (Tex. Ct. App. 1987) 6

In re R.C.P., 57 S.W.3d 365 (Mo. Ct. App. 2001) 7

Jones v. *Jones*, 832 N.E.2d 1057 (Ind. Ct. App. 2005) 6

Kendall v. *Kendall*, 687 N.E.2d 1228 (Mass. 1997) 6

Table of Authorities—Continued

Page(s)

Khalsa v. *Khalsa*, 751 P.2d 715 (N.M. Ct. App. 1988) 6

Koshko v. *Haining*, 2007 WL 93237 (Md. 2007) 2, 4, 7

Locklin v. *Duka*, 929 P.2d 930 (Nev. 1997) 7

Mary D. v. *Watt*, 438 S.E.2d 521 (W.Va. 1992) 7

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 6

Moore v. *Moore*, 547 N.Y.S.2d 794 (App. Div. 1989); 6

Moriarty v. *Bradt*, 827 A.2d 203 (2003), ... 3, 8

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 6

Prince v. *Massachusetts*, 321 U.S. 158 (1944) 6

R.M. v. *V.H.*, 2006 WL 1389864 (Del. Fam. Ct. 2006) 5

Taraboletti v. *Taraboletti*, 372 N.E.2d 155 (Ill. Ct. App. 1978) 7

Tennessee v. *Campbell*, 682 So. 2d 1274 (La. Ct. App. 1996) 7

Troxel v. *Granville*, 530 U.S. 57 (2000) ..... *passim*

Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 6

Zummo v. *Zummo*, 574 A.2d 1130 (Pa. Super Ct. 1990) 6

Table of Authorities—Continued

Page(s)

Statutes

750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006) 9

Mich. Comp. Laws § 722.27b(4)(b) (2006) 9

Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006) 9

Other Authorities

Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 Sup. Ct. Rev. 279 (2000) 5

Developments in the Law—Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies, 116 Harv. L. Rev. 2052 (2003) 5

Laurence C. Nolan, *Beyond* Troxel*: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 Drake L. Rev. 267 (2002) 5

In *Troxel* v. *Granville*, 530 U.S. 57 (2000), this Court recognized that statutes permitting court-ordered grandparent visitation may violate a parent's fundamental constitutional right to make decisions concerning the care, custody, and control of his or her children, *id.* at 68. This case concerns a deep divide among the state courts of last resort as to the legal standard grandparents must meet before a court may order grandparent custody or visitation over a fit parent's objection. At least thirteen States require (as a matter of *federal* constitutional law) a showing that the child will suffer harm without grandparent visitation; twelve state high courts have held that the Constitution requires merely that grandparents demonstrate that such visitation or custody would be in the "best interests of the child." Respondent's attempts to deny that conflict and to dissuade this Court from bringing clarity to this significant constitutional question are unavailing.

Respondent does not dispute (nor can she) that, in *Troxel*, seven Justices recognized that court-ordered grandparent visitation over a fit parent's objection implicates the parent's fundamental constitutional rights. See Pet. 2. Indeed, respondent concedes that "in *Troxel* * * * a fundamental parental right was threatened." Opp. 15. Respondent also does not dispute that *Troxel* expressly reserved the precise question this case squarely presents. See Pet. 3; 530 U.S. at 73.

Instead, respondent denies that a conflict exists on this issue, claiming that petitioner has "manufacture[d]" merely "the appearance of a division." Opp. 9. Making that remarkable assertion requires respondent to ignore the very decision she hopes to preserve: The court below *itself* detailed the clear split of authority among the States (Pet. App. 22a-24a & nn.21-22), as have many other courts (see *infra* pp. 3-5). Respondent seeks to deflect this Court's attention from that well-documented division by suggesting that "a kaleidoscope of different methods" (Opp. 9) sufficiently protects fit parents' fundamental constitutional

right to make child-rearing decisions. But calling a split of authority "semantic" (Opp. 11, 19) does not make it so. Respondent offers no counter to the fact that, as detailed in the petition, ten state courts of last resort and three state legislatures assert that *Troxel* and the Fourteenth Amendment *require* a showing of actual or potential harm, while twelve other state courts of last resort hold that it does not, allowing judges to order grandparent custody or visitation over a fit parent's objection upon finding merely that doing so would be in the child's best interests. Pet. 12-19, 87a-98a; see also *Koshko* v. *Haining*, 2007 WL 93237 (Md. Jan. 12, 2007); *In re E.S.* v. *P.D.*, 2007 WL 470389 (N.Y. Feb. 15, 2007). Moreover, the persistence of this division is readily apparent: In just the two months since this petition for a writ of certiorari was filed, two more state courts of last resort have reached opposite conclusions on exactly this question. See *Koshko*, 2007 WL 93237; *In re E.S.*, 2007 WL 470389; *infra* pp. 3-5.

Respondent's assertions that petitioner somehow seeks the creation of a new constitutional right or hopes to "constitutionalize the field of grandparent * * * visitation law" (Opp. 15) are baseless. To the contrary, this case asks the Court simply to settle disagreement about the content of the fundamental constitutional right recognized in *Troxel*. Deciding where the federal Constitution ends and States' prerogatives begin is a quintessential function of this Court, and that guidance is desperately needed here.

I. Respondent's Attempts To Deny And Obscure The Deep And Widely Recognized Division Among The States Are Futile

A. The Pennsylvania Supreme Court And Other State High Courts Have Explicitly Recognized The Conflict And Two Recent Decisions Have Deepened It

Petitioner's claim that the conflict among the States is merely "semantic" (Opp. 11, 19) is wrong. Most obviously, it flatly contradicts the Pennsylvania Supreme Court below, which explicitly recognized the "harm"–"no harm" divide. Pet. 22a-24a & nn.21-22 (citing thirteen States that "have required a finding of harm prior to a grant of visitation or partial custody" and eight that have not). Moreover, respondent herself apparently acknowledged the existence of this conflict below. Resp. Pa. Br. 38 (arguing that, although "other jurisdictions read their statutes to require a showing of harm to the child, * * * [s]uch a showing of harm * * * need not be grafted onto [the Pennsylvania Grandparent Visitation Statute] to ensure its constitutional application").

Numerous other courts also have recognized this conflict, attributing it to divergent interpretations regarding the scope of the fundamental right recognized in *Troxel*. The Supreme Court of New Jersey, for example, after describing the distinct "harm" and "best interests" standards applied by different state high courts, *Moriarty* v. *Bradt*, 827 A.2d 203, 218-219 (2003), ultimately held the "best interests" standard insufficient to protect parental rights, *id.* at 222. Rather, it held that "the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child." *Ibid.*; see also *In re Marriage of Howard*, 661 N.W.2d 183, 190 (Iowa 2003); *Blixt* v. *Blixt*, 774 N.E.2d 1052, 1061 & n.16 (Mass. 2002);

Pet. App., 87a-108a (identifying those States that do and do not require a showing of harm under the federal Constitution). In short, the split of authority is recognized by virtually everyone but respondent.

Indeed, in the two months since this petition was filed, two more state courts of last resort have ruled on the precise question presented in this case, reaching opposite conclusions. In *Koshko* v. *Haining*, the Court of Appeals of Maryland relied in large part on *Troxel*, see 2007 WL 93237, at *7-*10 (Jan. 12, 2007), to hold that an evidentiary presumption in favor of a fit parent's decision was "not sufficient * * * to preserve the constitutionality of the [Maryland Grandparent Visitation Statute]," *id.* at *17. "[A] 'non-constitutional' best interests of the child inquiry * * * which is the proper crucible for resolving disputes *between fit parents*, is inadequate, by itself," that court held, "to protect the vital liberty interests implicated in disputes between *fit parents and third parties* over the upbringing of children." *Id.* at *18 (emphasis added). Preservation of those "fundamental parental liberty interests," the court explained, "requir[es] a threshold showing of * * * exceptional circumstances indicating that the lack of grandparental visitation has a significant deleterious effect upon the children." *Ibid.*

The Court of Appeals of New York recently interpreted *Troxel* to reach precisely the opposite conclusion. *In re E.S.* v. *P.D.*, 2007 WL 470389 (Feb 12, 2007). Relying in part upon the decision below in this case, *id.* at *15, the court held that New York's Grandparent Visitation Statute was constitutional as applied where "visitation between grandmother and the child is in the child's best interest," *id.* at *9. That court rejected a harm standard, holding instead that, under *Troxel*, the best interests standard sufficed so long as the grandparent

overcame an evidentiary presumption in favor of the fit parent's wishes. *Id.* at 15-16.[1]

In sum, respondent's characterization of the split among the state courts as merely "semantic" (Opp. 11, 19) or "hollow" (Opp. 14) not only ignores the pervasive confusion among state courts that have "wrestled with the question of how to analyze their nonparental visitation statutes post-*Troxel*," *R.M.* v. *V.H.*, 2006 WL 1389864, *9 (Del. Fam. Ct. 2006), but also contradicts the very decision she defends and numerous decisions by other state courts of last resort.

B. Respondent Fails To Grasp The Important Qualitative Difference Between The "Harm" And "Best Interests" Standards

More fundamentally, respondent attempts to obscure the legal significance of adopting a "harm" versus a "best-interests" or other lesser standard. "Harm" to the child is not an "ambiguous" concept (Opp. 16) that may be supplanted by

---

[1] Commentators also agree that post-*Troxel* confusion and division among the States regarding the proper legal standard to apply in grandparent visitation cases is pervasive and significant. See, *e.g.*, *Developments in the Law—Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 Harv. L. Rev. 2052, 2056 (2003) (arguing that "[t]he plurality opinion in *Troxel* * * * failed to deliver a clear, unambiguous standard under which to assess nonparental visitation statutes and has been the source of much confusion and debate"); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 Sup. Ct. Rev. 279, 313 (2000) (expressing concern that *Troxel*'s "in-between approach" provided too little guidance "to state and federal courts, charged with resolving the host of cases that *Troxel* [would] inspire"); Laurence C. Nolan, *Beyond* Troxel*: The Pragmatic Challenges of Grandparent Visitation Continue*, 50 Drake L. Rev. 267, 267-68 (2002) (arguing that the "future of [grandparent visitation] orders is unsettled because the Court [in *Troxel*] did not decide whether a 'harm' standard or a 'best interest of the child' standard was the appropriate standard by which to weigh the constitutionality of grandparent visitation statutes").

choosing among a "kaleidoscope of different methods" (*id.* at 9) for evaluating grandparents' claims. The signal value of the harm requirement is that it establishes a qualitative legal standard—not a procedural or evidentiary barrier—that is distinct from the "best interests" test. That is, even if a court were to determine that grandparent visitation would be in the child's "best interests" (by whatever evidentiary standard), that does not answer whether the child would suffer "harm" without that visitation. Indeed, this Court has recognized the distinct and vital role a harm-based standard plays when parents' rights to rear their children are at issue. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 239 (1972) (justifying exemption from compulsory high school attendance based on lack of "harm to the physical or mental health" of Amish children); *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944) (concluding that "harmful possibilities[, including] psychological or physical injury," justified state restriction of certain child activities permitted by parents); *Meyer* v. *Nebraska*, 262 U.S. 390, 403 (1923) (invalidating state law prohibiting foreign-language education in elementary schools aimed at parents who wanted to educate their children in their native language because foreign language instruction was "not injurious to the health, morals or understanding of the ordinary child"); *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534 (1925) (holding that States cannot restrict parents from sending their children to private schools in part because private education is "not inherently harmful").

Likewise, numerous state courts appreciate the qualitative significance of a harm standard. For example, when determining whether to restrict parents' right to determine their children's religious upbringing,[2] whether to grant

---

[2] See, *e.g.*, *Jones* v. *Jones*, 832 N.E.2d 1057, 1059-61 (Ind. Ct. App. 2005); *Moore* v. *Moore*, 547 N.Y.S.2d 794, 794 (App. Div. 1989); *In re Marriage of Knighton*, 723 S.W.2d 274, 282-83 (Tex. Ct. App. 1987); *Kendall* v. *Kendall*, 687 N.E.2d 1228, 1232 (Mass. 1997); *Zummo* v. *Zummo*, 574 A.2d 1130, 1140 (Pa. Super Ct. 1990); *Khalsa*

custody to third parties rather than natural or adoptive parents,[3] and whether to deny visitation rights to noncustodial parents,[4] many state courts routinely apply a harm standard. Nor was "harm" too vague a standard for the thirteen States that have held the Fourteenth Amendment requires it in this specific context, see Pet.12-17; *Koshko*, 2007 WL 93237 (Md. Jan. 12, 2007), and none of the twelve States that have rejected a harm standard did so because of some perceived "ambiguity," see Pet. 17-19; *In re E.S.* v. *P.D.*, 2007 WL 470389 (N.Y. Feb. 15, 2007). What those courts *have* had difficulty understanding is whether a harm standard is constitutionally required for a court to overrule a fit parent's decision limiting visitation with his or her child. See *Troxel*, 530 U.S. at 69 (plurality opinion).

That certain circumstances considered in the "best interests" analysis have been cited as *potential* sources of harm (Opp. 11) is beside the point. Factors such as a "preexisting relationship of some significance between the grandparent and the child" (*id.* at 10) or the degree to which a child "would benefit from the continued opportunity to spend time with his maternal great-grandfather" (*id.* at 4) may, of course, be *relevant* to a harm analysis. But in the court

---

v. *Khalsa*, 751 P.2d 715, 721 (N.M. Ct. App. 1988); *Hanson* v. *Hanson*, 404 N.W.2d 460, 463 (N.D. 1987).

[3] See, *e.g.*, *Locklin* v. *Duka*, 929 P.2d 930, 933 (Nev. 1997); *In re R.C.P.*, 57 S.W.3d 365, 377 (Mo. Ct. App. 2001); *In Interest of B.B.*, 559 So. 2d 1277, 1278 (Fla. Ct. App. 1990) (construing "'detriment' to mean circumstances which produce or are likely to produce mental, physical, or emotional harm of a lasting nature).

[4] See, *e.g.*, *In re Marriage of Gebhardt*, 783 P.2d 400, 405 (Mont. 1989); *Taraboletti* v. *Taraboletti*, 372 N.E.2d 155, 157 (Ill. Ct. App. 1978) (terminating visitation rights "where the physical and mental well being of the child has been endangered by the non-custodial parent's conduct"); *Iadicicco ex rel. Watkins* v. *Iadicicco*, 704 N.Y.S.2d 377, 378 (App. Div. 2000); *Mary D.* v. *Watt*, 438 S.E.2d 521, 529 (W.Va. 1992); *Tennessee* v. *Campbell*, 682 So. 2d 1274, 1279-80 (La. Ct. App. 1996).

below, as in all other States that do not require a specific finding of harm, such factors may be deemed *conclusive* as to whether the fit parent's wishes may be set aside, without any finding that harm is, in fact, likely to result. While respondent assumes that the fact that the same evidence is relevant under two legal standards somehow establishes that the two standards are not really different—or that the difference between them is insignificant—scores of this Court's cases show otherwise.[5] See, *e.g.*, *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 372-373 (2001) ("Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient [to prove discriminatory intent]." (citation omitted)). Harm and no-harm are distinct standards that, in application, can lead to opposite results and would do so in this very case, as Chief Justice Cappy's dissenting opinion below explicitly recognized (App. 49a-52a) and the majority opinion below did not deny.

C. Respondent Does Not Dispute That States Have Adopted Divergent Standards On An Important Federal Constitutional Question

Even if respondent were correct that the decisions do not fall neatly into two categories (*i.e.*, "harm" and "no-harm"), that would not alter the fact that the States are in utter disarray as to what the Constitution requires before a fit parent's wishes may be set aside. Respondent does not dispute (nor can she) that the twenty-two state high courts to have squarely

---

[5] In fact, *Moriarty* v. *Bradt*, 827 A.2d 203 (N.J. 2003), the leading case respondent discusses (Opp. 12) in support of her assertion that the conflict this case presents is "essentially semantic" (Opp. 11), itself expressly (i) recognizes the conflict—"[courts] have engaged in one of two modes of analysis," 827 A.2d at 218; (ii) notes that the conflict involves two qualitatively different legal standards, compare *ibid.* with *id.* at 219; and (iii) grounds the conflict in the state courts' confusion over what *Troxel* means, *id.* at 218 ("Courts across the country have wrestled with the issue of grandparent visitation * * * after *Troxel*.").

addressed grandparent visitation claims unambiguously grounded their rulings in the federal Constitution. Regardless of whether one sees the cases as presenting a "harm"–"best-interests" divide or subdivides them further, the disarray is of federal constitutional dimension. This is not an instance where States simply have made different choices as a matter of policy or practice (Opp. 14-16); this is a conflict among *courts* (whether among two camps or twenty) about what the federal Constitution requires.[6] That widespread confusion only underscores the need for this Court's review.

II. Providing States A Clear Legal Standard To Safeguard *Troxel*'s Fundamental Right Will Not "Constitutionalize" New Areas of Law Or "Enmesh" This Court In Case-By-Case Adjudication

Lacking a credible argument that no deep conflict exists, respondent resorts to vague claims that resolving the conflict this case presents risks "constitutionaliz[ing] the field of grandparent (perhaps even all third-party) visitation law" (Opp. 15) and "enmesh[ing] the Court in * * * case-by-case adjudication and line-drawing" (*id.* 16). Neither claim is credible.

Adopting a consistent legal standard to govern cases where a grandparent seeks custody against a fit parent's objection would not further "constitutionalize" child custody and visitation law. In *Troxel*, seven Justices concluded that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. at 68 (plurality opinion); see also *id.* at 77 (Souter,

---

[6] Indeed, even those States that have legislated standards to govern grandparent visitation cases following *Troxel* have not done so based on policy judgments, but in order to remedy perceived federal constitutional infirmities in their respective laws. See 750 Ill. Comp. Stat. § 5/607(a-5)(3) (2006); Mich. Comp. Laws § 722.27b(4)(b) (2006); Tex. Fam. Code Ann. § 153.433(2) (Vernon 2006); Pet. 16-17.

J., concurring); *id.* at 86 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting). Thus, contrary to respondent's assertion, "every grandparent visitation application" *already* "implicate[s] constitutional principles." Opp. 17. The state courts are confused and conflicted, however, about how those constitutional principles apply when a grandparent seeks custody or visitation against a fit parent's wishes. Deciding this case would not create any new constitutional rights, but would merely resolve substantial confusion about what the right recognized in *Troxel* requires.

Likewise, respondent's claim that this case would commit the Court to case-by-case adjudication of state domestic relations issues is exactly backwards. Without this Court's guidance, the States have been mired in line-drawing and adjudication over which combination of facets from respondent's "kaleidoscope" (Opp. 9) are constitutionally required. Adoption of a clear legal standard—particularly one that requires a showing of actual or potential harm to the child—would reduce, not invite, continued litigation between fit parents and grandparents. Far from threatening to "enmesh" federal courts in the intricacies of family law, this case presents an ideal vehicle for the Court to provide a clear and consistent legal framework for States to apply when the fundamental liberty interests of fit parents to raise their children are at stake.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK T. STANCIL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

DANIEL R. ORTIZ
University of Virginia School of Law Supreme Court Litigation Clinic
580 Massie Road
Charlottesville, VA 22903
(434) 924-3127

HOWARD J. BASHMAN*
Law Offices of Howard J. Bashman
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458

**Counsel of Record*

MARCH 2007